No. 85-1717

Supreme Court, U.S.
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CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

RICHARD WRODA,

Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS FIRST JUDICIAL DISTRICT

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EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

QUESTION PRESENTED

Whether a trier of fact's consideration of measurement evidence, necessary to establish an essential element of an offense, violates the defendant's Sixth Amendment right to confrontation where the evidence is not produced at trial but obtained during an *in camera* examination.

TABLE OF CONTENTS

Page

QUESTION PRESENTED.....i

PRAYER.....1

OPINIONS BELOW.....1

JURISDICTION.....2

CONSTITUTIONAL PROVISIONS INVOLVED.....3

STATE STATUTES INVOLVED.....4

STATEMENT OF THE CASE.....4

REASONS FOR GRANTING THE WRIT.....9

Conclusion.....15

APPENDIX

TABLE OF CASES

Page

Garner v. Louisiana, 368 U.S. 157
173 (1961).....9, 12

People v. Gilbert, 68 Ill.2d 252,
369 N.E.2d 849 (1977).... 13

People v. Yarbrough, 93 Ill.2d 421,
444 N.E.2d 493 (1983).....13

Pointer v. Texas, 380 U.S. 400 (1965).....12

Sheppard v. Maxwell, 384 U.S. 333 (1966)....13

Turner v. Louisiana, 379 U.S. 466,
472 (1965).....13

IN THE

SUPREME COURT OF THE UNITED STATES

RICHARD WRODA,

Petitioner

vs.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

PRAYER

Petitioner Richard Wroda respectfully prays that a Writ of Certiorari issue to review the judgment and order of the Appellate Court of Illinois for the First Judicial District.

OPINIONS BELOW

The Order of the Appellate Court of Illinois for the First Judicial District

appears in Appendix A, attached hereto. The Order of the Appellate Court of Illinois denying a Petition for Rehearing appears in Appendix B, attached hereto. The Order of the Supreme Court of Illinois denying a Petition for Leave to Appeal appears in Appendix C, attached hereto. The Judgment Order and Sentence of the Circuit Court of Cook County, Illinois, appears in Appendix D, attached hereto.

JURISDICTION

The Order of the Appellate Court of Illinois, First Judicial District, was entered on August 2, 1985. The Petition for Rehearing was denied in an order entered October 22, 1985. Petition for Leave to Appeal from the Appellate Court to the Supreme Court of Illinois was denied on February 5, 1986. This Petition is filed within sixty (60) days of said ruling of the Supreme Court of Illinois,

and jurisdiction is invoked under 28 U.S.C. §1257.

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

The Fourteenth Amendment to the United States Constitution provides in part:

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATE STATUTES INVOLVED*

Ill. Rev. Stat. ch. 38, §12-4(a) (1981) (aggravated battery causing bodily harm).

Ill. Rev. Stat. ch. 38, §12-4(b) (1) (1981) (aggravated battery using a deadly weapon).

Ill. Rev. Stat. ch. 38, §33A-1-3 (1985) (armed violence).

STATEMENT OF THE CASE

On Saturday, June 4, 1983, Richard Wroda, in his car, encountered Roger Goranson, on his motorcycle, driving on Interstate 57. Wroda exited the Interstate closely followed by Goranson. A short distance off the highway, Wroda and Goranson stopped. An altercation ensued, during which Wroda stabbed Goranson with a knife.

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* The Sections of the Illinois Revised Statute are set forth in Appendix E, attached hereto.

Richard Wroda was charged with aggravated battery causing great bodily harm under Ill. Rev. Stat. ch. 38, §12-4(a) (1981), aggravated battery using a deadly weapon under Ill. Rev. Stat. ch. 38, §12-4(b)(1) (1981), and armed violence based upon aggravated battery causing great bodily harm under Ill. Rev. Stat. ch. 38, §§33A-2 and 12-4(a) (1985). Aggravated battery causing great bodily harm is a Class 3 felony, which carries a sentence of three to seven years. Ill. Rev. Stat, ch. 38, §1005-7-8 (1985). A person convicted of aggravated battery instead of incarceration may receive a sentence of probation or periodic imprisonment of no more than thirty months. Armed violence based on aggravated battery causing serious bodily harm is a Class X Felony under Illinois law which carries a mandatory sentence of six to thirty years with no possibility of probation or a term of periodic imprisonment.

In order to prove the offense of armed violence under Illinois law, the State must prove beyond a reasonable doubt that the defendant committed a felony armed with one of the weapons specified in the statute, including, a knife with a blade of at least three inches "or any other deadly or dangerous weapon or instrument of like character." Ill. Rev. Stat. ch. 38 §33A-1. At a bench trial, the State introduced the knife into evidence. There was no evidence produced, however, regarding the length of the knife.

The trial court found Richard Wroda guilty of aggravated battery based on great bodily harm, guilty on the charge of aggravated battery using a deadly weapon, which finding merged with the finding of guilty of aggravated battery based on great bodily harm, and guilty on the charge of armed violence based on aggravated battery causing great bodily harm. The trial court based the

armed violence conviction on a finding that the knife blade was in excess of three inches in length.

Prior to sentencing, during argument on post-trial motions regarding the sufficiency of the evidence, Petitioner argued that the state failed to introduce any evidence, which showed that he used a blade in excess of three inches. The trial court then advised the parties for the first time that, in chambers, it had measured the knife introduced at trial. Petitioner then maintained that the in camera measurement violated his rights to confrontation and due process. At sentencing, the trial court entered judgment only on the charge of armed violence and sentenced Wroda to six years imprisonment and three years parole.

Petitioner appealed his conviction to the Appellate Court of Illinois again raising the

confrontation issue, based on the trial court's out-of-court measurement of the knife. In his Petition for Rehearing, and again in his Petition for Leave to Appeal to the Supreme Court of Illinois, Wroda challenged the denial of his due process and confrontation rights.

REASONS FOR GRANTING THE WRIT

This Petition presents an important issue concerning the Sixth Amendment right to be informed of and to challenge the evidence used to obtain a criminal conviction. The Petitioner was convicted of the offense of armed violence under Illinois law on the basis of measurement evidence which was not introduced at trial but which was privately obtained by the trier of fact during an in camera examination of the weapon used in the offense. The appellate court's decision in this case is contrary to this court's holding in Garner v. Louisiana, 368 U.S. 157 (1961). This Court should grant the Petition in order to consider whether the Sixth Amendment prohibits a conviction based upon measurement evidence obtained by the fact finder during a private investigation.

Under Illinois law, the offense of armed violence is distinguished from the offense of

aggravated battery causing great bodily harm by the additional essential element that the defendant was armed with a "dangerous weapon," as defined in the armed violence statute, Ill. Rev. Stat. ch. 38, §33A-1-3 (1985), which is not an element of aggravated battery. Id. §12-4 (1981). The distinction between the two offenses is of critical significance in this case, since the punishment for armed violence is much more severe than the punishment for aggravated battery. Conviction for armed violence requires incarceration for up to thirty but not less than six years, with no possibility of probation or work release, while a person convicted of aggravated battery may receive either probation or work release but in any event could be incarcerated for no more than seven years. In the case at bar, Petitioner Wroda was deprived of any opportunity to challenge the measurement evidence which the trier of fact used to find him

guilty of the more serious offense of armed violence and was thereby deprived of his right to confrontation guaranteed to him under the Sixth Amendment and the Due Process Clause of the Fourteenth Amendment.

At trial, the State introduced the knife used in the altercation but failed to introduce any evidence as to the length of its blade. When the Petitioner argued that the State had failed to prove him guilty of armed violence because it had failed to introduce any evidence of the essential element of the length of the blade, the trial judge admitted that, as the trier of fact, he privately had measured the knife in chambers and found that the blade was of requisite length. The in camera measurement of the knife deprived the Petitioner of his constitutional right to contest the only evidence which the trier of fact used to find him guilty of the more serious offense of armed violence.

The Sixth Amendment guarantees that a conviction in a criminal case can be obtained only on the basis of evidence presented at trial which the defendant has had an opportunity to challenge. Garner v. Louisiana, 368 U.S. 157 (1961). In Garner, this Court reversed a conviction on the ground that a trial judge's use of judicial notice to establish facts proving an essential element of an offense violated the defendant's right to due process by depriving him of an opportunity to contest the evidence used to convict him. Id. at 173.* This Court said, "[U]nless an accused is informed at trial of the facts of which the court is taking judicial notice, not only does he not know upon what evidence

* Although decided on due process grounds, the rationale of this Court in Garner is consistent with Sixth Amendment analysis. Since Garner, the Sixth Amendment has been applied to state criminal proceedings. Pointer v. Texas, 380 U.S. 400 (1965).

he is being convicted, but, in addition, he is deprived of any opportunity to challenge the deductions drawn from such notice or to dispute the notoriety or truth of the facts allegedly relied upon." Id. See also, Turner v. Louisiana, 379 U.S. 466, 472 (1965) (right to confrontation violated where verdict is based on private communications between witneses and jurors). See Sheppard v. Maxwell, 384 U.S. 333 (1966) (reversing conviction on due process grounds where jurors relied upon news accounts rather than evidence produced in open court).*

The appellate court's holding in this case is plainly contrary to this Court's holding in Garner. The appellate court held that the Petitioner was not deprived of his

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* Although the Supreme Court of Illinois has recognized this application of the Sixth Amendment right to confrontation, its decision in this case indicates a rejection of this fundamental aspect of a fair trial. See, e.g., People v. Yarbrough, 93 Ill.2d 421, 444 N.E.2d 493 (1983). People v. Gilbert, 68 Ill.2d 252, 369 N.E.2d 849 (1977).

right to contest the evidence as to the length of the blade because a conviction for armed violence does not require evidence of the length of the blade but could also be based upon a finding that the knife in question was of a deadly or dangerous character like the weapons listed in the statute. App. at 18a. Assuming that this is a permissible application of the Illinois armed violence statute,* it does not alleviate the prejudice resulting from the deprivation of the Petitioner's right to confrontation. The trial judge did not find that the knife in this case was of a dangerous character similar to the weapons listed in the statute. Rather, unsupported by any evidence introduced at trial, the judge found that the knife was longer than three inches only after he measured the knife in camera.

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* How a knife with a blade of less than three inches could be as dangerous or deadly, as required by the statute, as a knife with a blade of the statutory minimum length of three inches is a question of state law not before this Court.

That the trial judge felt compelled to measure the blade demonstrates that its length was not obvious and therefore not an appropriate fact for judicial notice. To permit the Petitioner's conviction to rest upon a potential finding of fact which the trial judge could have made would, as in Garner, "allow the prosecution to do through argument . . . what it is required . . . to do at the trial." 368 U.S. at 173.

Because the Petitioner's conviction for armed violence was based upon measurement evidence which was not introduced at trial and which the Petitioner had no opportunity to contest, his Sixth Amendment right to confrontation was violated. The appellate court's holding in this case is irreconcilable with this Court's holding in Garner v. Louisiana.

CONCLUSION

For the foregoing reasons, Petitioner Richard Wroda respectfully prays that this Honorable Court issue its Writ of Certiorari to review the judgment and order of the Appellate Court of Illinois for the First District.

Respectfully submitted,

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APPENDICES

APPENDIX A

IN THE APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,
Plaintiff-Appellee,

v.

RICHARD WRODA,
Defendant-Appellant.

No. 84-1561

Appeal from the Circuit Court
of Cook County

Honorable Cornelius Houtsma, Judge Presiding

ORDER DISPOSING OF APPEAL
UNDER SUPREME COURT RULE 23

Following a bench trial, defendant was found guilty of aggravated battery based on great bodily harm (Ill. Rev. Stat. 1983, ch. 38, par. 12-4(a)), aggravated battery using a deadly weapon (Ill. Rev. Stat. 1983, ch. 38, par. 12-4(b)(1)), and armed violence based upon aggravated battery causing great bodily harm (Ill. Rev. Stat. 1983, ch. 38, par. 33A-2/12-4(a)). The trial court then sentenced defendant to a six-year term only on the armed violence conviction.

On appeal, defendant raises three issues: (1) whether the State proved beyond a reasonable doubt that he did not act in self-defense; (2) whether the trial court's judgment on the armed violence count was based on aggravated battery using a deadly weapon, an impermissible double enhancement requiring reversal of defendant's armed violence conviction; and (3) whether the trial court improperly conducted an experiment on the knife by measuring its length; thereby producing evidence not introduced at trial.[1]

Roger Goranson, the complaining witness, testified that on June 5, 1983, he and his wife left a bar in Richton, Illinois, where he had consumed five beers. While traveling southbound in the right-hand lane of I-57 on his motorcycle, complainant came upon a slow moving vehicle in his lane. Defendant, driving an

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[1] The State has not filed a brief as appellee, but this does not preclude disposition of the appeal. First Capitol Mortgage Corporation v. Talandis Construction Corporation (1976), 63 Ill. 2d 128, 345 N.E.2d 493.

automobile, then pulled up next to complainant in the left-hand lane and remained there for a distance, matching the speed of the slow moving vehicle in front of complainant and boxing him in. When defendant eventually passed complainant and the vehicle in front of him, complainant passed both the slow moving vehicle and defendant before returning to the right-hand lane. According to complainant, defendant then forced him onto the shoulder of the road by passing while defendant's car was half-way in the right-hand lane. Complainant then passed defendant, but as complainant was exiting the expressway at Route 30, defendant again forced him off the road. Complainant, who was angry, followed defendant "to find out what was going on."

Complainant further testified that he followed defendant to the vicinity of Lindenwood and Kostner Avenues in Matteson, Illinois, where defendant stopped his vehicle in the middle of

the road. Complainant, who was angry, followed defendant "to find out what was going on."

Complainant further testified that he followed defendant to the vicinity of Lindenwood and Kostner Avenues in Matteson, Illinois, where defendant stopped his vehicle in the middle of the road. Complainant stopped his motorcycle to the left and rear of defendant's vehicle and walked to the front of defendant's vehicle. When defendant, who was approximately 6 feet tall and weighed 150 pounds, got out of his vehicle, complainant, who was 5 feet 9 inches tall and who weighed 175 pounds, shoved him against defendant's vehicle. Defendant then began punching complainant. According to complainant "it hurt awful lot for a punch," and complainant spun around to get away. Defendant then stabbed him in the back. When complainant moved away, he saw that defendant had a knife in his hand. Defendant then began kicking complainant's motorcycle and threatening to kill complainant and his wife. Complainant, who was unarmed, told his wife to run and told defendant

he had had enough. When defendant abruptly turned and got back into his vehicle, complainant saw a police car approaching. Complainant was subsequently taken to a hospital where he spent 26 days in treatment for a perforated bowel caused by stab wounds in his left side. He had four stab wounds on his body below his shoulder. Complainant identified the knife defendant had used and complainant's black leather motorcycle jacket which was cut where he had been stabbed.

Paula Lach, defendant's girl friend, testified that she was a passenger in his car on June 5, 1983, when he left a party at 2:20 a.m. to go to his home. As they were traveling south on I-57, she saw a motorcycle ahead and to the right of defendant's car. When the motorcycle later prevented defendant from moving into the right lane, defendant tried to speed up, but the motorcycle also accelerated. The witness did not recall seeing any other vehicles that night, nor did she notice defendant's car

forcing the motorcycle off the road. She further testified that defendant eventually moved his vehicle into the right-hand lane and exited the highway, but the motorcycle followed close behind. When defendant reached Lindenwood, he stopped the vehicle suddenly, causing the witness to fall out of her seat. The motorcycle stopped ahead and to the left of defendant's vehicle. Defendant then exited his vehicle holding a knife behind his back as complainant approached. The witness did not see what occurred as they met, but she saw defendant and complainant locked together at one point. She did not see defendant stab complainant because she looked away. Defendant then reentered his vehicle, handed the witness the knife, and told her that he had stabbed complainant twice. When asked if complainant had anything in his hands, the witness responded that she could not see anything.

Officer Michael Halpin, the arresting officer, then testified that on June 5, 1983,

at approximately 2:30 a.m., he was on patrol in the vicinity of Lindenwood and Kostner Avenues in Matteson, Illinois, when complainant's wife crossed his path screaming for help. She told him her husband had just been stabbed, pointed in his direction, and told him the license plate number of defendant's vehicle. The officer then observed complainant standing next to a motorcycle and a vehicle leaving the scene. When complainant's wife told him that was the offender, the officer pursued and stopped the vehicle two blocks away. Defendant did not try to flee. After removing defendant and the passenger from the car, the officer observed a purse halfway open in the vehicle from which the handle of a knife protruded. He then recovered the knife.

The parties stipulated that if Dr. Suchy were called to testify, he would testify that he examined complainant on June 5, 1983; that complainant was admitted to the hospital with stab wounds in the left anterior and posterior

thoracic area, as well as the left upper quadrant and the left flank of the abdomen; that his impression was multiple torso trauma, secondary to several stab wounds, and alcohol intoxication; and that complainant was in the hospital for 26 days. The parties further stipulated that a lab technician would testify that complainant's blood alcohol content was 229 milligrams percentage when he first sought hospitalization.

Defendant then testified that on June 5, 1983, at approximately 2 a.m. he left a party with his girl friend after consuming approximately 10 cups of beer. As he was driving south on I-57 he noticed a motorcycle, but there were no other vehicles on the road. The driver of the motorcycle was very big and was wearing a black leather jacket. As defendant proceeded to pass the motorcycle in the left lane, it accelerated; when defendant tried to slow his vehicle, the motorcycle also decelerated. After this pattern repeated,

defendant pulled into the right-hand lane behind complainant. When complainant then decelerated, defendant passed him and returned to the right-hand lane. According to defendant, complainant then pulled alongside defendant's vehicle, kicked the side of defendant's vehicle as they were traveling at 60 miles per hour and then returned to the right-hand lane behind defendant. When defendant exited the expressway, complainant followed him, repeatedly coming up close behind defendant's vehicle and then backing off.

Defendant further testified that when he stopped his vehicle on Lindenwood, complainant stopped his motorcycle behind defendant. Defendant then got out of his vehicle with his work knife behind his back because he was frightened. According to defendant, complainant said that he would teach defendant a lesson; complainant then pushed him against his vehicle, and hit him several times in the face. When defendant then ducked, complainant continued to

punch the back of his head and shoulders. Defendant further testified that he then punched complainant, who was still hitting him, and twice asked complainant to "get off me." Although defendant had the knife in his hand when he punched complainant, he denied stabbing complainant and stated that he did not know how complainant suffered his wounds. After defendant punched complainant a second time, complainant said he had had enough. Defendant then gave the knife to his girl friend and drove away. The police stopped him one-half block away. He later told the assistant State's Attorney that he went to his car and got the knife after complainant started beating him because he was frightened.

In pronouncing its findings, the trial court stated that, although it was aware that complainant was intoxicated, it found very little credibility in defendant's testimony: it felt that complainant's testimony was credible, and that Paula Lach's testimony was very

credible. The trial court then found defendant guilty on the charge of aggravated battery based on great bodily harm stating there would be judgment on that finding· guilty on the charge of aggravated battery using a deadly weapon, but no judgment would be entered on that finding because it would merge with the armed violence based on aggravated battery causing great bodily harm, commenting that there would be judgment on that finding and that the knife blade was obviously well in excess of three inches in length. Subsequently, at sentencing, the trial court struck the judgment but not the finding of guilty on the aggravated battery based on great bodily harm and sentenced defendant only on the armed violence conviction.

Immediately prior to sentencing, during the course of argument on defendant's post-trial motions, defendant argued that the State did not offer any evidence or opinion as to the length of the knife blade and that the State therefore failed to prove beyond a reasonable doubt the

charge as stated in the indictment that defendant used a blade in excess of three inches. The trial court then advised the parties for the first time that in chambers it had measured the knife blade introduced into evidence.

On appeal, defendant first contends that the State failed to prove beyond a reasonable doubt the essential element that defendant did not act in self-defense. We cannot agree.

Once the issue of self-defense is raised, the burden shifts to the State to prove beyond a reasonable doubt that defendant did not act in self-defense. (Ill. Rev. Stat. 1983 ch. 38, par. 3-2(b); People v. Williams (1974), 57 Ill. 2d 239, 311 N.E.2d 681; People v. Tirrell (1980), 87 Ill. App. 3d 511, 408 N.E.2d 1202. However, the issue of self-defense is a question of fact. (People v. Tirrell.) Defendant's testimony here was sufficient to raise the issue

of self-defense. If defendant's evidence on the issue of self-defense is palpably contrary to the trial court's finding, it renders that finding so improbable as to leave a reasonable doubt as to defendant's guilt, then the trial court's judgment must be reversed. (See People v. Tirrell.) However, defendant's exculpatory testimony need not be believed by either the trial court or a court of review. People v. Tirrell; see People v. Easter (1981), 102 Ill. App. 3d 974, 430 N.E.2d 612.

If the trial court determined that defendant was the aggressor, then the defense of self-defense was unavailable to him. (People v. Easter.) Moreover, even if the trial court believed that complainant was the aggressor, it would still have to decide whether defendant's resort to force was reasonable under the circumstances and whether the amount of force used by defendant was commensurate with the

force encountered. (People v. Easter.) Thus, the trial court could have determined that defendant's use of deadly force was unreasonable and excessive under the circumstances especially in view of the testimony that complainant was unarmed at the time he was stabbed. While there is no requirement that the victim possess a weapon in order to permit a claim of self-defense, the absence of a weapon is a factor which may be considered. See People v. Easter. Moreover, even if complainant initiated the altercation, defendant was not entitled to pursue and injure complainant once he attempted to flee the confrontation. (People v. Easter; People v. Tirrell.) Defendant's action in stabbing complainant after he was retreating is not defensible or explainable on the grounds that he wished to disarm or disable complainant, nor can we say that defendant was justified in stabbing complainant four times. We recognize

that in judging whether defendant's use of force in self-defense was justified, it is defendant's perception of danger, not the actual peril, that is dispositive, and defendant is not required to exercise "infallible judgment" in a brief period of time while under great stress and excitement. (See People v Tirrell.) However, we believe that even under this subjective test, defendant's actions in this case were not justifiable under the guise of self-defense.

Defendant cites People v. Baker (1975), 31 Ill. App. 3d 51, 334 N.E.2d 249, in support of his argument. However, there the court reversed the conviction where the smaller defendant, after firing a warning shot and pleading with complainant to stop, shot complainant, who was one of two larger men who had been beating a woman and choking defendant and who were approaching and threatening to kill defendant at the time of the shooting. In contrast, the

evidence here shows that the taller defendant hid a knife behind his back and then without warning stabbed complainant four times, once while complainant was in the process of retreating. Under the circumstances, we cannot say that the trial court's determination was so unreasonable, improbable or unsatisfactory as to raise a reasonable doubt as to defendant's guilt.

Defendant next contends that the trial court's judgment on the armed violence count was based on aggravated battery using a deadly weapon, an impermissible double enhancement requiring reversal of his armed violence conviction. We disagree.

A review of the record in this case shows that defendant was not convicted of armed violence based on aggravated battery using a deadly weapon, but rather defendant was charged and convicted of armed violence based upon aggravated battery causing great bodily harm.

Although a charge of aggravated battery based on the use of a deadly weapon may not serve as the predicate felony for armed violence (People v. Haron (1981), Ill. 2d 261, 422 N.E.2d 627), aggravated battery causing great bodily harm may properly be used as the predicate felony for armed violence (People v. Decker (1984), 126 Ill. App. 3d 428, 467 N.E.2d 366). Defendant's conviction of armed violence predicated upon aggravated battery causing great bodily harm did not result from an impermissible double enhancement despite the fact that the great bodily harm was caused by the dangerous weapon because use of the weapon is not an element of aggravated battery causing great bodily harm. People v. Decker.

Defendant finally contends that the trial court improperly conducted an experiment on the knife in measuring its length, thereby producing evidence not introduced at trial to base the

finding of guilt for armed violence. Although the trial court may have conducted a private investigation which had the effect of producing evidence which was not introduced at trial, this does not warrant reversal of defendant's armed violence conviction.

Defendant argues that the State was required to prove, as an essential element of the armed violence count as charged, that he was armed with a knife with a blade at least three inches in length (Ill. Rev. Stat. 1983, ch. 38, par. 33A-1 (b)) and that the State failed to introduce any evidence as to the knife's measurement. Although the rule in Illinois is that it is improper for the trier of fact to conduct experiments or private investigations which have the effect of producing evidence which was not introduced at trial (People v. Gilbert. (1977), 68 Ill. 2d 252, 369 N.E.2d 849), it is also established that a conviction

for armed violence does not require an explicit showing that the knife used had a three-inch blade. People v. Jones (1984), 128 Ill. App. 3d 842, 471 N.E.2d 590; People v. Hall (1983), 117 Ill. App. 3d 788, 453 N.E.2d 1327.) The evidence in this case provides ample support for the conclusion that the knife used in the commission of the offense was capable of causing harm or injury; thus even if there was no explicit showing that the knife used by defendant was per se dangerous because of its blade length, there was an explicit showing that it was transformed by defendant's usage into a dangerous weapon well within the meaning of the armed violence statute. See People v Hall.

Moreover, although defendant was specifically charged with armed violence based upon the use of a knife with a blade of at least three inches, defendant was also charged with separate counts of aggravated battery caused by using a

deadly weapon and armed violence with intent to commit murder by attempting to kill complainant by stabbing him with a knife. Hence, we conclude that any variance between the single charge of armed violence and the proofs thereof did not mislead defendant as to the charges against him or hamper his defense. Therefore, any such variance is not fatal. People v. Jones.

Accordingly, we affirm the judgment of the circuit court of Cook County.

Dated at Chicago, Illinois, this 2nd day of August, 1985.

PINCHAM, J., MEJDA, P.J. and LORENZ, J., concur.

APPENDIX B

IN THE APPELLATE COURT, STATE OF ILLINOIS
FIRST DISTRICT

PEOPLE OF THE STATE OF ILLINOIS,	)	
Plaintiff-Appellee,	)	
v.	)	NO. 84-1561
RICHARD WRODA,	)	
Defendant-Appellant.	)	

ORDER

Defendant-Appellant's Petition for Rehearing is denied.

By

/s/ Justice Presiding Mejda

/s/ Justice Lorenz

/s/ Justice Pincham

APPENDIX C

STATE OF ILLINOIS
SUPREME COURT

At a Term of the Supreme Court, begun and held in Springfield, on Monday, the thirteenth day of January, 1986.

Present: William G. Clark, Chief Justice

Justice Daniel P. Ward Justice Howard C. Ryan

Justice Seymour Simon Justice Thomas J. Moran

Justice Ben Miller Justice Joseph H. Goldenhersh

On the fifth day of February, 1986, the Supreme Court entered the following judgment:

No. 62734

People State of Illinois Respondent v. Richard Wroda, Petitioner	Petition for Leave to Appeal from Appellate Court First District 1-84-1561

The Court having considered the Petition for Leave to Appeal and being fully advised of the premises, the Petition for Leave to Appeal is DENIED.

As Clerk of the Supreme Court of the State of Illinois and keeper of the records, files and Seal thereof, I certify that the foregoing is a true copy of the final order in this case.

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed the Seal of said Court this twenty-seventh day of February, 1986.

/s/ Juliann Hornyak
Clerk,
Supreme Court of the
State of Illinois

APPENDIX D

Arrest Document No. DO 4399478

MORGAN M. FINLEY, CLERK OF THE CIRCUIT COURT
OF COOK COUNTY
NOTIFICATION OF FELONY FINAL DISPOSITION

MUNICIPAL DEPARTMENT 6TH MUNICIPAL DISTRICT

DEFENDANT'S NAME: Richard L. Wroda

Last Known address: 424 Linderwood,
Matteson, IL

D/L No. NIA Arresting Agency: Matteson

Date of Birth: 3-20-59

Place of Birth: Chicago, IL SEX: Male

RACE: White

CONVICTION INFORMATION

Date: 6-20-84 Judge: C. Houtsma, Jr.

Indictment No. 83 C005857 FINDING: GUILTY

COUNT I

CONVICTED UNDER Chap. 38 Sec. 33/a Par. 2-1

CHARGE: Arm Vio.

Imprisonment to State Dept. of Corr. for 6 yrs. plus 3 years M.S.R.

APPENDIX E

Section 33A-1 provides as follows:

> Definitions. (a) "Armed with a dangerous weapon". A person is considered armed with a dangerous weapon for purposes of this Article, when he carries on or about his person or is otherwise armed with a category I or category II weapon. (b) A category I weapon is a pistol, revolver, rifle, shotgun, spring gun, or any other firearm, sawed-off-shotgun, a stun gun or taser as defined in paragraph (a) of Section 24-1 of this Code, a knife with a blade of at least 3 inches in length, dagger, dirk, switchblade knife, stiletto, or any other deadly or dangerous weapon or instrument of like character. (c) A category II weapon is a bludgeon, blackjack, slungshot, sand-bag, sand-club, metal knuckles, billy or other dangerous weapon of like character.

Ill. Rev. Stat. §33A-1 (1985).

Section 33A-2 provides:

> Armed violence-Elements of the offense. A person commits armed violence when, while armed with a dangerous weapon, he commits any felony defined by Illinois law.

Ill. Rev. Stat. §33A-2 (1985).

Section 33A-3 provides:

> (a) Violation of Section 33A-2 with a Category I weapon is a Class X felony. (b) Violation of Section 33A-2 with a Category II weapon is a Class 2 felony or the felony classification provided for

the same act while unarmed, whichever permits the greater penalty. A second or subsequent violation of Section 33A-2 with a Category II weapon is a Class I felony or the felony classification provided for the same act while unarmed, whichever permits the greater penalty.

Ill. Rev. Stat. §33A-3 (1985).

Section 12-4 provide:

(a) A person who, in committing a battery, intentionally or knowingly causes great bodily harm, or permanent disability or disfigurement commits aggravated battery.

(b) A person who, in committing a battery either:

(1) Uses a deadly weapon;

(2) Is hooded, robed or masked, in such manner as to conceal his identity;

(3) Knows the individual harmed to be a teacher or other person employed in any school and such teacher or other employee is upon the grounds of a school or grounds adjacent thereto, or is in any part of a building used for school purposes.

(4) Knows the individual harmed to be a supervisor, director, instructor or other person employed in any park district and such supervisor, director, instructor or other employee is upon the grounds of the park or grounds adjacent thereto, or is in any part of a building used for park purposes;

(5) Knows the individual harmed to be a caseworker, investigator, or other person employed by the State Department of Public Aid or a County Department of Public Aid and such caseworker, investigator, or other person is upon the grounds of a Public Aid office or grounds adjacent thereto, or is in any part of a building used for Public Aid purposes, or upon the grounds of a home of a public aid applicant, recipient, or any other person being interviewed or investigated in the employee's discharge of his duties, or on grounds adjacent thereto, or is in any part of a building in which the applicant, recipient, or other such person resides or is located;

(6) Knows the individual harmed to be a peace officer, or a person summoned and directed by him, or a correctional officer, while such officer is engaged in the execution of any of his official duties including arrest or attempted arrest;

(7) Knows the individual harmed to be a fireman engaged in the execution of any of his official duties;

(8) Is, or the person battered is, on or about a public way, public property or public place of accommodation or amusement; or

(9) Knows the individual harmed to be the driver, operator, employee or passenger of any transportation facility or system engaged in the business of transportation of the public for hire and the individual assaulted is then performing in such capacity or then using such public transportation as a passenger or using any area of any description designated by the transportation facility or system as a vehicle boarding, departure, or transfer location commits aggravated battery.

(c) A person who administers to an individual or causes him to take, without his consent or by threat or deception, and for other than medical purposes, any intoxicating, poisonous, stupefying, narcotic or anesthetic substance commits aggravated battery.

(d) A person who knowingly gives to another person any food that contains any substance or object that is intended to cause physical injury if eaten, commits aggravated battery.

(e) Sentence.

Aggravated battery is a Class 3 felony.

Ill. Rev. Stat. ch. 38, §12-4 (1981).

Supreme Court, U.S.
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NO. 85-1717

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1985

RICHARD WRODA,

Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS FIRST JUDICIAL DISTRICT

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Respondent.

QUESTION PRESENTED FOR REVIEW

Whether the constitutional issue of the right confrontation is presented by the actions of the trial dge who convicted petitioner of armed violence after easuring the length of the blade of the knife admitted to evidence in chambers, where the Appellate Court of inois affirmed the conviction based upon state law ich provides that a conviction for armed violence is oper without evidence of blade length if the evidence ows that the use of the knife rendered it a dangerous apon.

TABLE OF CONTENTS

	PAGE
QUESTION PRESENTED FOR REVIEW.....	i
TABLE OF CONTENTS.....	ii
TABLE OF AUTHORITIES.....	iii
OPINION BELOW.....	1
JURISDICTION.....	2
CONSTITUTIONAL PROVISION INVOLVED....	2
STATEMENT OF THE CASE.....	2
REASON FOR DENYING THE WRIT:.....	7
Since The Decision Of The Appellate Court Of Illinois Is Based On An Interpretation Of The Illinois Statute On Armed Violence And On The Ground That Any Variance Between Indictment And Proof Was Not Fatal, No Constitutional Issue Is Presented For Review.....	7
CONCLUSION.....	17

TABLE OF AUTHORITIES

CASES:

People v. Clark, 96 Ill. App. 3d 491, 421 N.E.2d 590 (3rd Dist. 1981)..... 12

People v. Ritter, 89 Ill. App. 3d 113, 411 N.E.2d 560 (3rd Dist. 1980)..... 12

People v. Zuniga, 99 Ill. App. 3d 396, 425 N.E.2d 1094 (1st Dist. 1981)..... 12

United States v. Warden, 545 F.2d 32 (7th Cir. 1976)..... 12

United States ex rel. Harris v. State of Illinois, 457 F.2d 191 (7th Cir. 1972), cert. denied, 409 U.S. 860 (1972)..... 12

People v. Hall, 117 Ill. App. 3d 788, 453 N.E.2d 1327 (1st Dist. 1983), cert. denied, 104 S.Ct. 2683..... 13

People v. Jones, 128 Ill. App. 3d 842, 471 N.E.2d 590 (1st Dist. 1984)..... 13

Garner v. Louisiana, 368 U.S. 157 (1961) (distinguished)..... 14, 15

CONSTITUTIONAL PROVISION:

U.S. CONST., AMEND. VI..... 2

STATUTES:

Ill. Rev. Stat. 1983, ch. 38, secs. 33A-1, 33A-2..... 8, 9

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OPINION BELOW

The petitoner was found guilty of armed violence by Judge Cornelius J. Houtsma, Jr. of the Circuit Court of Cook County, Illinois. The Appellate Court of Illinois affirmed the conviction. (No. 85-588, August 2, 1985) See Petitioner's Appendix A. Petitioner's petition for rehearing was denied. See Petitioner's Appendix B. Petitioner's petition for leave to appeal to the Supreme Court of Illinois was denied on February 5, 1986. See Petitioner's Appendix C.

JURISDICTION

Petitioner invokes this Court's jurisdiction pursuant to 28 U.S.C. sec. 1257. However, as treated more fully below, respondent submits that no good reason exists for this Court to grant the instant petition for writ of certiorari.

CONSTITUTIONAL PROVISION INVOLVED

U.S. Const. amendment VI provides, in pertinent part, that:

In all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him.

STATEMENT OF THE CASE

Richard Wroda, Petitioner, was charged by the Grand Jury of the Circuit Court of Cook County, Illinois, with the offenses of attempt murder, aggravated battery (two counts), and armed violence (two counts) in Indictment No. 83-5857. On April 5, 1984, trial commenced in the Circuit Court of Cook County, Illinois,

re the Honorable Cornelius J. Houtsma, Jr. after tioner waived his right to a jury trial. At trial the owing evidence was adduced, in summary.

Rodger Goranson, the victim, testified that on June 983, at about 1:00 a.m. he and his wife went for a on a motorcycle. Later, while Goranson was driving n expressway, a car, a white Honda, pushed him off road. The Honda forced Goranson off the road again n he was on an exit ramp. Goranson then followed the da to a location near an intersection in Matteson, ois. There the Honda stopped, and Goranson stopped motorcycle. Petitioner Wroda, the driver of the da, got out. Goranson came up to him, shoved him, asked him what was the matter with him. Wroda then hed Goranson, but Goranson said he felt more pain would be normal for a punch. Goranson spun around started to go away when Wroda stabbed him in the . Goranson moved back to his motorcycle, and Wroda ted to kick the motorcycle and to threaten Goranson Goranson's wife. Goranson saw that Wroda had a e. Goranson told his wife to run and told Wroda he t want anymore. Wroda got back into his car.

Goranson was hospitalized for 26 days. He suffered a perforated bowel caused by four stab wounds. At trial Goranson identified a buck knife as the knife he saw in Wroda's hand.

Paula Lach, the girlfriend of Petitioner Wroda, testified that she was in the car with Wroda. A motorcycle was behind them, and after an encounter on the highway Wroda came to a sudden stop on a street. Wroda got out of the car. He had a knife in his hand, and he held the knife behind his back. She looked away when Wroda and Goranson were locked together. When Wroda reentered the car he gave her the knife and told her to put it into her purse. He also told her that he had stabbed the man.

Detective Michael Halpin of the Matteson Police Department testified that he encountered Mrs. Goranson screaming for help and saying that her husband had just been stabbed. She pointed out the offender's car. Detective Halpin pursued the car, arrested Petitioner Wroda, and recovered the knife which Wroda had used. The knife was admitted into evidence without objection.

Petitioner Wroda testified on his own behalf. He described his encounter with a motorcycle on the expressway. He testified that he stopped his car and got out, and the man on the motorcycle got off his motorcycle. Wroda acknowledged that he had a knife, and he identified the knife that had been admitted into evidence as the one. Wroda testified that the man pushed him hard against the car and hit him in the face. Wroda ducked down and punched the man with the knife. The man said that he had had enough and so Wroda went to his car, gave the knife to his girlfriend, and drove off until stopped by the police. Wroda admitted that he had the knife behind his back when he got out of the car.

The trial judge found Wroda not guilty of attempt murder and not guilty of the charge of armed violence based on attempt murder. The judge found Wroda guilty of both counts of aggravated battery and guilty of the charge of armed violence based on aggravated battery. The judge noted that the knife was obviously in excess of three inches in length. On June 20, 1984, the judge sentenced Wroda to six years in the Illinois Department of Corrections on the armed violence conviction only.

Before sentencing defense counsel filed a motion for new trial in which he argued that there had been no proof that the knife used had a blade in excess of three inches, as alleged in the indictment. The trial judge stated that he measured the blade himself and added that the blade was four inches. The judge said "to me it's obvious."

On June 20, 1984, Wroda filed Notice of Appeal. On August 2, 1985, the Appellate Court of Illinois, First Judicial District, affirmed Wroda's conviction. On October 22, 1985, the same Appellate Court denied Wroda's Petition for Rehearing. The Supreme Court of Illinois denied Petitioner Wroda's Petition for Leave to Appeal. Petitioner Wroda now petitions this Honorable Court for a writ of certiorari.

REASONS FOR DENYING THE WRIT

SINCE THE DECISION OF THE APPELLATE COURT OF ILLINOIS IS BASED ON AN INTERPRETATION OF THE ILLINOIS STATUTE ON ARMED VIOLENCE AND ON THE GROUND THAT ANY VARIANCE BETWEEN INDICTMENT AND PROOF WAS NOT FATAL, NO CONSTITUTIONAL ISSUE IS PRESENTED FOR REVIEW.

Petitioner Richard Wroda petitions this Honorable Court for a writ of certiorari to the Appellate Court of Illinois and alleges that his Sixth Amendment right to confrontation was violated when the trial judge privately measured the length of the blade of the knife introduced into evidence and then found petitioner guilty on a charge of armed violence, which charge specified that the blade had to be at least three inches long. The People maintain that the petition should be denied because the Appellate Court of Illinois affirmed the Petitioner's conviction on separate state grounds, namely on the grounds of a non-fatal variance between indictment and proof. The Appellate Court held that even though it is improper for

trier of fact to conduct private experiments or estigations, a conviction for armed violence in Illinois s not require proof that the knife used had a three- h blade where the evidence showed that the knife was dangerous weapon. Since the Appellate Court found ple proof in the record that the knife which petitioner lded was transformed by his use of it into a dangerous pon, the Court decided that any variance between the ictment and proof was not fatal. Thus, the Appellate urt of Illinois affirmed the petitioner's conviction on quate state grounds and decided no constitutional s. Therefore the petition should be denied.

The Illinois armed violence statute provides:

> A person commits armed violence when, while armed with a dangerous weapon, he commits any felony defined by Illinois Law. Ill. Rev. Stat. 1983, ch. 38, sec. 33A-2.

med with a dangerous weapon" is defined in Ill. Rev. t. 1983, ch. 38, sec. 33A-1 as follows:

> (a) **"Armed with a dangerous weapon."**
> A person is considered armed with a dangerous weapon for purposes of this Article,

when he carries on or about his person or is otherwise armed with a category I or category II weapon.

(b) A Category I weapon is a pistol, revolver, rifle, shotgun, spring gun, or any other firearm, sawed-off shotgun, a stun gun or taser as defined in paragraph (a) of Section 24-1 of this Code, knife with a blade of at least 3 inches in length, dagger, dirk, switchblade knife, stiletto, or any other deadly or dangerous weapon or instrument of like character.

(c) A category II weapon is a bludgeon, black-jack, slung-shot, sand-bag, sand club, metal knuckles, billy or other dangerous weapon of like character. (emphasis added)

Petitioner Wroda was charged with attempt murder, two counts of aggravated battery and two counts of armed violence. The trial judge found petitioner guilty of both counts of aggravated battery and of one count of armed violence, but he entered judgment and sentence only on the armed violence count, the most serious offense. That armed violence count read that on June 5th, 1983 at and within Cook County, Illinois, Richard L. Wroda committed the offense of armed violence "in that he, while armed with a dangerous weapon, to wit: a knife

with a blade over three inches in length, intentionally and knowingly without legal justification caused great bodily harm to Rodger Goranson by stabbing him on and about the body with said knife, in violation of chapter 38, section 33A-2/I/12-4-A of the Illinois Revised Statutes 1981 as amended."

At trial the evidence showed that petitioner Wroda stabbed the victim, Goranson, four times with a knife after Wroda's car and Goranson's motorcycle encountered each other on an expressway. Goranson was hospitalized for 26 days as a result of the stabbings. The knife which Wroda used was admitted into evidence without objection and Wroda himself acknowledged in his testimony that that was the knife he used. There was no testimony about the length of the blade, however.

In making his finding of guilty, the trial judge noted that the knife was obviously well in excess of three inches in length. Before sentencing, defense counsel filed a motion for new trial and argued that there had been no evidence presented that the blade was in excess of three inches. The judge responded that he had measured the blade and it was four inches. The judge said "to me it's obvious" and denied the motion for new trial.

On appeal Wroda argued that the People failed to introduce any evidence as to the length of the blade. The Appellate Court of Illinois agreed that it is improper for the trier of fact to conduct experiments or private investigations which have the effect of producing evidence which was not introduced at trial. However, the Court went on to hold that reversal was not required since there was ample evidence that petitioner committed a felony (aggravated battery) while armed with a dangerous weapon. The Court noted that even if there was no explicit showing that the knife used by defendant was per se dangerous because of its blade length, there was an explicit showing that it was transformed by defendant's usage into a dangerous weapon well within the meaning of the armed violence statute.

This conclusion was amply supported by the evidence which showed that petitioner Wroda stabbed the victim four times with the knife and as a result the victim was hospitalized for 26 days due to the four stab wounds, one of which penetrated the peritoneal lining of the victim's abdomen. The Court was clearly corrected in concluding that the knife Wroda used was a dangerous weapon.

The Appellate Court of Illinois went on to state that any variance between the indictment and the proof was not fatal. In reaching this conclusion the Court relied on Illinois law concerning variance. Illinois law has consistently provided that a variance between the charging instrument and the proof presented at trial is not fatal where the offense charged is sufficiently set forth to enable an accused to properly prepare a defense and raise the judgment as a plea in bar to a later prosecution for the same offense. People v. Clark, 96 Ill. App. 3d 491, 421 N.E.2d 590 (3rd Dist. 1981). People v. Ritter, 89 Ill. App. 3d 113, 411 N.E.2d 560 (3rd Dist. 1980). People v. Zuniga, 99 Ill. App. 3d 396, 425 N.E.2d 1094 (1st Dist. 1981). The same principle has been applied by federal courts. See United States v. Warden, 545 F.2d 32 (7th Cir. 1976). United States ex rel. Harris v. State of Illinois, 457 F.2d 191 (7th Cir. 1972), cert. denied, 409 U.S. 860 (1972).

In the instant case the offense was charged with sufficient specifity to have enabled petitioner, Wroda to properly prepare a defense. The armed violence count alleged that Wroda was armed with a dangerous weapon,

to wit: a knife. The armed violence count also specified what Wroda did with the knife: he stabbed Goranson with it. The language of the armed violence count that the knife had a blade in excess of three inches was properly treated as surplusage since armed violence, under Illinois law, requires the defendant simply to be armed with a dangerous weapon and the definition of dangerous weapon is not limited, in the case of knives, to knives with a blade in excess of three inches, but includes any other deadly or dangerous weapon or instrument of like character. Hence, the Appellate Court of Illinois was clearly correct in basing its decision on the separate state ground that any variance between indictment and proof in the instant case was not fatal.

The conclusion of the Appellate Court concerning variance is amply supported by Illinois law concerning the Illinois armed violence statute. In People v. Hall, 117 Ill. App. 3d 788, 453 N.E.2d 1327 (1st Dist. 1983) cert. denied, 104 S.Ct. 2683, the Appellate Court of Illinois upheld an armed violence conviction even though the charging instrument did not specify the blade-length of the knife. In People v. Jones, 128 Ill. App. 3d 842, 471 N.E.2d 590

1st Dist. 1984), one armed violence conviction was upheld even though the charging instrument specified that the knife had a blade of at least three inches but there was no proof of the blade-length. Thus, under Illincis law, where the charging instrument charges armed violence and charges that the defendant was armed with a dangerous weapon, namely a knife, and the proof at trial shows that defendant's use of the knife was such as to render it a dangerous weapon, the defendant can properly be convicted of armed violence whether or not the blade-length of the knife is alleged and proved.

It is clear that Petitioner Wroda's petition presents no constitutional issues. The Appellate Court opinion affirming Wroda's conviction dealt with the interpretation of an Illinois statute and with the application of the Illinois law of variance to the facts presented at Wroda's trial. It did not decide any constitutional issues. The petition for writ of certiorari should be denied.

Petitioner relies on Garner v. Louisiana, 368 U.S. 157 (1961). The facts of that case are not even remotely similar to the instant case. In Garner several black defendants were convicted of disturbing the peace for

efusing to move from a cafe counter seat in a racially egregated restaurant. This Court reversed the onvictions of the defendants and rejected the argument aised by the respondent on appeal that the trial court ould have taken judicial notice of the history of race elations in the area to conclude that the actions of the efendants could cause a disturbance. This Court pointed ut that the record did not show that the trial court took dicial notice of anything. In the instant case, in ontrast, the trial judge did say that he measured the ife blade and that to him it was obvious that it was over ree inches. A plausible argument can be made that a ourt can determine that an object is over three inches in ngth by simply examining it once it is admitted into idence. Such a determination is not analogous to an stated assumption about the history of race relations in given area as in Garner. However, whether or not the al judge could properly make such a determination of gth is not the issue in the instant case. The issue is ether a defendant can be convicted of armed violence ed on his use of a knife when the indictment charges used a knife with a blade in excess of three inches even

if there is no proof of this length. This issue is purely a question of state law and was correctly decided against Petitioner by the Appellate Court of Illinois. The Appellate Court of Illinois decided this issue on purely state grounds and did not reach any constitutional issues. Therefore, the petition for writ of certiorari should be denied.

CONCLUSION

For all the foregoing reasons, Respondent respectfully prays that this Honorable Court deny the instant Petition for Writ of Certiorari.

Respectfully submitted,

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